No. 99-2036

Supreme Court, U.S.
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In The

Supreme Court of the United States

THE GOOD NEWS CLUB, et al.,

Petitioners,

v.

MILFORD CENTRAL SCHOOL.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF FOR *AMICI CURIAE*, THE STATES OF ALABAMA, IOWA, LOUISIANA, MISSISSIPPI, NEBRASKA, OHIO, SOUTH CAROLINA, TEXAS, AND VIRGINIA IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a public school that permits speakers to use its facilities after school hours to instruct "in any branch of education, learning or the arts," to "benefit the welfare of the community," and to "promote the morals of children," but forbids speakers whose speech it deems to be too religious from using its facilities, engages in viewpoint discrimination in violation of the Free Speech Clause of the United States Constitution?

2. Whether a governmental official's determination whether speech is "a discussion of morals from a religious viewpoint" (which is deemed to be permissible speech) or is "religious instruction" (which is deemed to be impermissible speech) unconstitutionally entangles the state with religion in violation of the Establishment Clause of the United States Constitution?

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BRIEF FOR *AMICI CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The States of Alabama, Iowa, Louisiana, Mississippi, Nebraska, Ohio, South Carolina, Texas, and Virginia respectfully submit this brief as *amici curiae* pursuant to Supreme Court Rule 37.4. The *amici* States submit this brief in support of the petition for writ of certiorari to the United States Court of Appeals for the Second Circuit filed in this case by Petitioners The Good News Club, Andrea Fournier, and Darleen Fournier.

INTEREST OF *AMICI CURIAE*

The States joining in this brief as *amici curiae* have a profound interest in protecting the free-speech rights and religious liberties of their citizens, and in ensuring that their public school officials have clear and reliable guidance when they face questions concerning the use of public school property by religious organizations. The decisions of the lower courts in this case, *Good News Club* v. *Milford Central School*, 202 F.3d 502 (2d Cir. 2000), *aff'g* 21 F. Supp. 2d 127 (N.D.N.Y. 1998), subject religious speech to unconstitutional viewpoint-based discrimination and muddy the water in an area of First Amendment law that has been clear.

State and local school officials in the *amici* States have long relied on the guidance in cases such as *Widmar* v. *Vincent*, 454 U.S. 263 (1981), *Lamb's Chapel* v. *Center Moriches Union Free School District*, 508 U.S. 384 (1993), and *Rosenberger* v. *Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995), in adopting neutral policies governing the use of public school facilities. *See, e.g.*, Office of the Attorney General, State of Alabama, *Guidelines for*

Religious Activities in Schools (July 29, 1999) (reproduced in Appendix at 1a); *see also* U.S. Dep't of Educ., *Religious Expression in Public Schools* (Rev. ed. May 1998) (reproduced in Appendix at 1b). In following the course of neutrality, state and local officials have been assured by this Court's decisions that they could safely navigate between the Scylla of violating the Free Speech Clause and the Charybdis of violating the Establishment Clause when facing requests for use of public school facilities by religious clubs and organizations.

The decision below in this case casts doubt on the scope of this Court's precedents, leaving officials in the *amici* States in the position of attempting to discern whether the previously certain course set by the principle of viewpoint neutrality remains good law in all cases, or if it must be modified. This uncertainty leaves public officials open to lawsuits no matter what they decide when a religious club or organization requests to use school facilities. The *amici* States respectfully submit that this is an issue of national importance that requires resolution by this Court.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE SECOND CIRCUIT IN THIS CASE SUBJECTS RELIGIOUS SPEECH TO UNCONSTITUTIONAL VIEWPOINT DISCRIMINATION.

The decision in this case is a substantial and troubling departure from the guiding principle of neutrality embodied in this Court's precedents regarding free speech and religious liberties in limited public fora created by public schools and universities. *See, e.g., Board of Regents of Univ. of Wis. Sys.* v. *Southworth*, 120 S. Ct. 1346,

1350, 1356-57 (2000); *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 839-46 (1995); *Lamb's Chapel* v. *Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 392-97 (1993); *Widmar* v. *Vincent*, 454 U.S. 263, 277 (1981).[1]

This case involves the same state statute, N.Y. Educ. Law § 414 (McKinney 1988 & Supp. 2000), at issue seven years ago in *Lamb's Chapel*. *See* 508 U.S. at 386. This case also involves a school board policy similar to that in *Lamb's Chapel*. *Compare id.* at 387 (describing Center Moriches policy) *with* App. to Pet. for Cert. at D1-D3 (Milford policy). Without mentioning *Lamb's Chapel*, however, the Second Circuit held that the school's action was a permissible form of content discrimination, rather than impermissible viewpoint discrimination. *See* 202 F.3d at 509-11. One judge dissented, however, stating that he could not "square the majority analysis in this case with *Lamb's Chapel*." *Id.* at 513 (Jacobs, J., dissenting).

With its ruling, the Second Circuit – speaking through the author of the decision reversed in *Lamb's Chapel*[2] – attempted to revive reasoning rejected by this Court in that case and in *Widmar* and *Rosenberger*. The *amici* States submit that under this Court's precedents, the decision of the Second Circuit must be reversed.

---

[1] The parties agreed, and the courts below held that Milford Central School had created a limited public forum through its community use policy. 202 F.3d at 509; 21 F. Supp. 2d at 153. This Court's recent decision in *Santa Fe Independent School District* v. *Doe*, 530 U.S. ___ (2000), is thus inapposite here because the Court held that no public forum had been created in that case. *Id.* at ___ & nn.12-13 (slip op. at 10-11 & nn.12-13).

[2] *See* 202 F.3d at 504 (showing Judge Miner as author of opinion); *Lamb's Chapel* v. *Center Moriches Union Free Sch. Dist.*, 959 F.2d 381, 383 (2d Cir. 1992) (same), *rev'd*, 508 U.S. 384 (1993).

A. Public Officials May Not Engage in Viewpoint Discrimination Against Religious Speech in a Limited Public Forum.

1. *Widmar* v. *Vincent*

In 1981, this Court held that "religious worship and discussion" in a limited public forum "are forms of speech and association protected by the First Amendment." *Widmar* v. *Vincent*, 454 U.S. at 269. Accordingly, the discriminatory exclusion of religious speech from a limited public forum can only be justified if it "is necessary to serve a compelling state interest and . . . is narrowly drawn to achieve that end." *Id.* at 270. The University of Missouri at Kansas City had contended in *Widmar* that allowing religious groups and speakers to use its facilities would violate the Establishment Clause, asserting the need to avoid such a violation as a compelling interest requiring the exclusion of the religious groups. *Id.* at 270-71. This Court rejected that argument, however, holding that an "equal access" policy to the limited public forum would not violate the Establishment Clause. *Id.* at 271, 273-75. The Court thus held that the University's interest was insufficient to justify a content-based restriction on speech. *Id.* at 276-77.

The dissent in *Widmar* "argue[d] that 'religious worship' is not speech generally protected by the 'free speech' guarantee of the First Amendment and the 'equal protection' guarantee of the Fourteenth Amendment." *Id.* at 269 n.6 (citing *id.* at 284 (White, J., dissenting)). The Court rejected this attempt to distinguish "between the kinds of religious speech explicitly protected by our cases and a new class of religious 'speech act[s]' constituting 'worship.'" *Id.* at 269 n.6 (quoting *id.* at 285 (White, J., dissenting)). The Court cited "at least three difficulties"

with attempting to distinguish between religious "speech" and religious "worship" for purposes of First Amendment protection:

> First, the dissent fails to establish that the distinction has intelligible content. There is no indication when "singing hymns, reading scripture, and teaching biblical principles," cease to be "singing, teaching, and reading" – all apparently forms of "speech," despite their religious subject matter – and become unprotected "worship."
>
> Second, even if the distinction drew an arguably principled line, it is highly doubtful that it would lie within the judicial competence to administer. Merely to draw the distinction would require the university – and ultimately the courts – to inquire into the significance of words and practices to different religious faiths, and in varying circumstances by the same faith. Such inquiries would tend inevitably to entangle the State with religion in a manner forbidden by our cases.
>
> Finally, the dissent fails to establish the *relevance* of the distinction on which it seeks to rely. . . . [I]t gives no reason why the Establishment Clause, or any other provision of the Constitution, would require different treatment for religious speech designed to win religious converts than for religious worship by persons already converted. . . .

Id. at 269-70 n.6 (citations omitted) (quoting *id.* at 283 (White, J., dissenting)).

2. *Lamb's Chapel* v. *Center Moriches Union Free School District*

In 1993, this Court again addressed the issue of a religious organization's access to a limited public forum. As noted, *Lamb's Chapel* v. *Center Moriches Union Free School District* involved the application of a school board's community access policy, similar to the Milford policy, adopted pursuant to N.Y. Educ. Law § 414. 508 U.S. at 386-87. The Center Moriches policy allowed school facilities to be used after school hours for "social, civic, or recreational uses (Rule 10) and use by political organizations if secured in compliance with § 414 (Rule 8)." *Id.* at 387. The policy forbade, however, use of school facilities " 'by any group for religious purposes.' " *Id.* (quoting policy).

Lamb's Chapel, "an evangelical church in the community of Center Moriches," *id.*, applied for permission to use school facilities to show a film series by a Christian psychologist, Dr. James Dobson. *Id.* at 387-88 & n.2. According to the Court, a "brochure stated that the film series would discuss Dr. Dobson's views on the undermining influences of the media that could only be counterbalanced by returning to traditional, Christian family values instilled at an early stage." *Id.* at 388. The school board denied the church's applications because the film series " 'appear[ed] to be church related.' " *Id.* at 389.

The district court upheld the school board's decision, "not[ing] that the enumerated purposes for which § 414 allowed access to school facilities did not include religious worship or instruction, that Rule 7 explicitly proscribe[d] using school facilities for religious purposes, and that the Church had conceded that its showing of the film series would be for religious purposes." *Id.* (citing

770 F. Supp. 91, 92, 98-99 (E.D.N.Y. 1991), *aff'd*, 959 F.2d 381 (2d Cir. 1992), *rev'd*, 508 U.S. 384 (1993)). The Second Circuit affirmed. 959 F.2d 381 (2d Cir. 1992), *rev'd*, 508 U.S. 384 (1993). The Second Circuit observed that exclusions from a limited public forum "need only be reasonable and viewpoint neutral, and ruled that denying access to the church for the purpose of showing its film did not violate this standard." 508 U.S. at 390 (citation omitted). The Court of Appeals concluded that the exclusion of the church "was viewpoint neutral because it had been, and would be, applied in the same way to all uses of school property for religious purposes." *Id.* at 393.

This Court reversed. 508 U.S. at 390-97. The Court acknowledged that, as a limited public forum, control over access to the forum "can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." *Id.* at 392-93 (quoting *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985)). The Court concluded, however, that the application of the school board policy to exclude the church's presentation of a film series on family issues was not "viewpoint neutral." *Id.* at 393-94.

According to this Court, the "critical question" was "whether it discriminates on the basis of viewpoint to permit school property to be used for the presentation of all views about family issues and child rearing except those dealing with the subject matter from a religious standpoint." *Id.* The Court explained that there had been "no suggestion . . . that a lecture or film about child rearing and family values would not be a use for social or civic purposes otherwise permitted by Rule 10. That subject matter is not one that the District has placed off limits

to any and all speakers." *Id.* Quoting from its decision in *Cornelius*, the Court observed that

> "[a]though a speaker may be excluded from a non-public forum if he wishes to address a topic not encompassed within the purpose of the forum . . . or if he is not a member of the class of speakers for whose especial benefit the forum was created . . . , the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject."

Id. at 394 (quoting *Cornelius*, 473 U.S. at 806).

The Court held that the film series in *Lamb's Chapel* "no doubt dealt with a subject otherwise permissible under Rule 10, and its exhibition was denied solely because the series dealt with the subject from a religious standpoint." *Id.* It then held that " 'the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.' " *Id.* (quoting *City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U.S. 789, 804 (1984)). The Court, relying on *Widmar*, easily dismissed the school board's argument that permitting its property to be used for the film series would violate the Establishment Clause. *Id.* at 394-95. The Court noted that

> [t]he showing of this film series would not have been during school hours, would not have been sponsored by the school, and would have been open to the public, not just to church members. The district property had repeatedly been used by a wide variety of private organizations. Under these circumstances, as in *Widmar*, there would have been no realistic danger that the community would think that the district was endorsing religion or any particular creed, and

> any benefit to religion or to the church would have been no more than incidental.

Id. at 395.

3. *Rosenberger* v. *Rector & Visitors of the University of Virginia*

In 1995, the Court addressed a student activities fund created by the University of Virginia, that paid the printing costs of student publications. *Rosenberger* v. *Rector & Visitors of the Univ. of Va.*, 515 U.S. at 824-25. Among the categories of student groups allowed to seek payment to third-party contractors were " 'student news, information, opinion, entertainment, or academic communications media groups.' " *Id.* at 824 (quoting fund's Guidelines). Under the fund's Guidelines, however, "religious activities" were excluded from the fund's support. *Id.* at 825.

A student organization at the University asked the fund to pay the printing costs for its magazine called "Wide Awake: A Christian Perspective at the University of Virginia." *Id.* at 826-27. The University denied the request because Wide Awake was a "religious activity." *Id.* at 827. The student publishers of Wide Awake sued, and the lower courts upheld the University's decision. *Id.* at 827-28.

In this Court, the University argued that its Guidelines were constitutional because they drew "lines based on content, not viewpoint." *Id.* at 830. This Court acknowledged that

> in determining whether the State is acting to preserve the limits of the forum it has created so that the exclusion of a class of speech is legitimate, we have observed a distinction between,

> on the one hand, content discrimination, which may be permissible if it preserves the purposes of that limited forum, and, on the other hand, viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations.

Id. at 829-30 (citing *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983)). The Court concluded, however, that the University's actions were properly classified as viewpoint discrimination. *Id.* at 831.

The Court distinguished between content discrimination and viewpoint discrimination in the context of religious speech:

> As we have noted, discrimination against one set of views or ideas is but a subset or particular instance of the more general phenomenon of content discrimination. And, it must be acknowledged, the distinction is not a precise one. It is, in a sense, something of an understatement to speak of religious thought and discussion as just a viewpoint, as distinct from a comprehensive body of thought. . . . We conclude, nonetheless, that here, as in *Lamb's Chapel*, viewpoint discrimination is the proper way to interpret the University's objections to Wide Awake. By the very terms of the SAF prohibition, the University does not exclude religion as a subject matter but selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints. Religion may be a vast area of inquiry, but it also provides, as it did here, a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered. The prohibited perspective, not the general subject matter,

> resulted in the refusal to make third-party payments, for the subjects discussed were otherwise within the approved category of publications.

Id. at 830-31 (citation omitted). The Court thus held that the University's action was "based upon viewpoint discrimination not unlike the discrimination the school district relied upon in *Lamb's Chapel* and that we found invalid." *Id.* at 832.

The Court rejected "[t]he dissent's assertion that no viewpoint discrimination occur[ed] because the Guidelines discriminate[d] against an entire class of viewpoints. . . . " *Id.* at 831. The Court also rejected the dissent's assertion that allowing funds to flow to the Christian magazine would violate the Establishment Clause. *Id* at 837-45. The Court observed that "[a] central lesson of our decisions is that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality toward religion," *id.* at 839, and held that the University's program was, in fact, "neutral toward religion." *Id.* at 840.

The Court then responded to the dissent's view that the University's discrimination against religious activities was necessary under the Establishment Clause:

> Were the dissent's view to become law, it would require the University, in order to avoid a constitutional violation, to scrutinize the content of student speech, lest the expression in question – speech otherwise protected by the Constitution – contain too great a religious content. The dissent, in fact anticipates such censorship as "crucial" in distinguishing between "works characterized by the evangelism of Wide Awake and writing that merely happens to express views that a given religion might approve."

> That eventuality raises the specter of governmental censorship, to ensure that all student writings and publications meet some baseline standard of secular orthodoxy. To impose that standard on student speech at a university is to imperil the very sources of free speech and expression. As we recognized in *Widmar*, official censorship would be far more inconsistent with the Establishment Clause's dictates than would governmental provision of secular printing services on a religion-blind basis.

Id. at 844-45 (citation omitted). The Court held that such censorship of student speech and thought "was a denial of the right of free speech and would risk fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires." *Id.* at 845-46.

B. The Decision of the Second Circuit in this Case Authorizes Government Censorship of Religious Speech Based Upon the Religious Viewpoint of the Good News Club and Its Speakers.

The Second Circuit's decision in this case conflicts with this Court's decisions in *Widmar*, *Lamb's Chapel*, and *Rosenberger* and authorizes (if not requires) government officials to censor private speech to filter out views that are "too" religious. In the name of prohibiting "religious instruction" and "worship," the Court of Appeals authorized government officials to root out those views that do not "meet some baseline standard of secular orthodoxy." *Rosenberger*, 515 U.S. at 844.

Much like the Center Moriches policy in *Lamb's Chapel*, the Milford policy allows district residents to

> use school facilities for "holding social, civic and recreational meetings and entertainment

> events and other uses pertaining to the welfare of the community, provided that such uses shall be nonexclusive and shall be open to the general public," and otherwise consistent with state law.

202 F.3d at 504 (quoting Milford "Community Use of School Facilities" Policy ¶ 3, *reprinted* in App. to Pet. for Cert., at D1). It is undisputed that the school district allows clubs such as the Boy Scouts, Girl Scouts, and 4-H Club to use their time on school property "to promote the moral and character development of children." Brief for Defendant-Appellee Milford Central School at 9, *Good News Club* v. *Milford Central Sch.*, 202 F.3d 502 (2d Cir. 2000) (No. 98-9494). The Good News Club's viewpoint on moral values, however, is that such values are "senseless without Christ." 202 F.3d at 509 (quoting Dep. of Steven Fournier). Thus, the Club attempts to encourage the "moral and character development of children" through Bible lessons, songs, prayer, and proselytizing.

The Second Circuit held that this was "something other than simply teaching moral values," that it did "not involve merely a religious perspective on the secular subject of morality," and that the Club "goes far beyond merely stating its viewpoint." *Id.* at 510. According to the Court of Appeals, the Club's activities were not materially different from "religious worship." *Id.* The Second Circuit thus held "that the Club's activities fall outside the bounds of pure 'moral and character development.' " *Id.* at 511.

The Second Circuit's classification of the Club's activities as unprotected "religious instruction" was exactly the approach rejected by this Court in *Widmar* and *Rosenberger*. In essence, the Court of Appeals followed the *dissents* in those cases, not the law of the majority opinions. Indeed, what happened in this case is precisely the

"specter" the Court feared in *Rosenberger*: Government officials scanned the Good News Club's materials, found that they did not meet the school district's "baseline standard of secular orthodoxy," 515 U.S. at 844, and refused to permit such views to be presented.

As in *Rosenberger*, the school district and the courts below failed to distinguish " 'between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.' " 515 U.S. at 841 (quoting *Board of Educ. of Westside Community Schs. (Dist. 66)* v. *Mergens*, 496 U.S. 226, 250 (1990) (plurality opinion)). By refusing to allow the Good News Club to address the "moral and character development of children" from a religious perspective, the Milford school officials censored the Club's viewpoint on moral development. Such censorship was not necessary to obey the Establishment Clause.

As in *Lamb's Chapel*, the Club's meetings "would not have been during school hours, would not have been sponsored by the school, and would have been open to" any child, not just Christian children or Club members. 505 U.S. at 395. As in *Lamb's Chapel*, Milford's "property had repeatedly been used by a wide variety of private organizations." *Id.* Given these facts, "there would have been no realistic danger that the community would think that the district was endorsing religion or any particular creed, and any benefit to religion or to the church would have been no more than incidental." *Id.* Any concern that school-age children might misunderstand the school's neutrality with respect to religion should have been addressed through an appropriate disclaimer by school officials.

Rather than displaying neutrality toward religion, however, the school district's actions demonstrated hostility toward religion. *See Mergens*, 496 U.S. at 248 ("[I]f a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion.") (plurality opinion). The Establishment Clause forbids such governmental hostility to religion, just as it forbids governmental endorsement of religion. *Lynch* v. *Donnelly*, 465 U.S. 668, 673 (1984) (The Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any.").

II. THE DECISION OF THE SECOND CIRCUIT CREATES A SPLIT IN THE CIRCUITS, CAUSING UNNECESSARY CONFUSION AND DIFFICULTY FOR PUBLIC OFFICIALS WHO MUST ROUTINELY ADDRESS REQUESTS TO USE PUBLIC FACILITIES.

The decision of the Second Circuit creates a conflict among the circuits with respect to the application of viewpoint neutrality to the use of public facilities by religious organizations. *Compare Gentala* v. *City of Tucson*, 213 F.3d 1055 (9th Cir. 2000) (holding that rejection of application to city's civic events fund to cover costs of city services for National Day of Prayer event violated Free Speech Clause); *Church on the Rock* v. *City of Albuquerque*, 84 F.3d 1273, 1281 (10th Cir.) (holding that city's policy prohibiting sectarian instruction and worship in city-owned senior centers violated the First Amendment and that the city's prohibition against the showing of a film about the life of Jesus was viewpoint discrimination), *cert. denied*, 519 U.S. 949 (1996); *Good News/Good Sports*

Club v. *School Dist. of Ladue*, 28 F.3d 1501, 1510 (8th Cir. 1994) (holding that Good News/Good Sports Club could use public school facilities despite the fact that the Good News/Good Sports Club's activities included singing religious songs, Bible reading, and prayer), *cert. denied*, 515 U.S. 1173 (1995), *with Good News Club*, 202 F.3d 502; *Campbell* v. *St. Tammany's Sch. Bd.*, 206 F.3d 482, 487 (5th Cir. 2000) (holding that the school district's rejection of the Louisiana Christian Coalition's request to use school facilities for a "prayer meeting" did not violate the Free Speech Clause). Petitioners have detailed the direct conflicts among the holdings in these cases, Pet. for Cert. 10-16, and the *amici* States need not repeat that analysis here.

What the *amici* States wish to bring to the Court's attention, however, is the difficulty this new conflict in the circuits creates for public school officials and others who oversee public facilities. These officials, most of whom are not lawyers, need clear channel markers if they are to navigate between the Free Speech Clause on one hand, and the Establishment Clause on the other.

In *Widmar*, *Lamb's Chapel*, and *Rosenberger*, this Court set out those markers, by placing certain inquiries beyond their authority. In so doing, the Court clarified (and simplified) the duties of public officials faced with requests from religious organizations to use public facilities. Public officials were required to review the purposes for which their facilities could be used, determine if the religious organization wished to use the facility for one of those purposes, and *then treat the religious organization just like any other group*. The officials were *not* required to distinguish between religious "speech" and religious "worship." *Widmar*, 454 U.S. at 269-70 & n.6. They were

not to evaluate the organization's materials to see if they were sufficiently secular. *Cf. Rosenberger*, 515 U.S. at 845-46. There was to be no endorsement of religion, but neither was there to be any discrimination against religion.

In accordance with these principles, the Attorney General of Alabama issued a set of *Guidelines for Religious Activities in Schools* to public school officials in Alabama. These *Guidelines* address, *inter alia*, the use of public school facilities by private religious organizations:

> • Private citizens and student groups must be allowed access to school facilities for meetings of a religious nature, subject to the same limitations placed on non-religious meetings.

App. at 3a. With respect to private baccalaureate services, the *Guidelines* similarly provide:

> • If a school by policy and practice rents out its facilities to private groups, it must rent them out on the same terms and conditions, and on a first-come first-served basis, to organizers of privately sponsored religious baccalaureate services.
> • Teachers and school administrators must demonstrate and observe neutrality with regard to private baccalaureate services and school officials may neither encourage nor discourage student attendance at such events.

App. at 4a.

The United States Department of Education has issued a similar set of guidelines entitled *Religious Expression in Public Schools*. Regarding baccalaureate services, the Department of Education guidelines likewise state:

> *Graduation prayer and baccalaureates:* Under current Supreme Court decisions, school officials may not mandate or organize prayer at

> graduation, nor organize religious baccalaureate ceremonies. If a school generally opens its facilities to private groups, it must make its facilities available on the same terms to organizers of privately sponsored religious baccalaureate services. A school may not extend preferential treatment to baccalaureate ceremonies and may in some instances be obliged to disclaim official endorsement of such ceremonies.
>
> *Official neutrality regarding religious activity*: Teachers and school administrators, when acting in those capacities, are representatives of the state and are prohibited by the establishment clause from soliciting or encouraging religious activity, and from participating in such activity with students. Teachers and administrators also are prohibited from discouraging activity because of its religious content, and from soliciting or encouraging antireligious activity.

App. at 8b. Guidelines such as these, that embodied the neutrality commanded by this Court's cases, had garnered broad support across a spectrum of religious traditions and political views.

Under the approach taken by the Second Circuit in this case, the task of public officials becomes far more difficult. Not only must officials determine whether the organization's request is consistent with the purposes for which the public facilities may be used, they must now also ask if the religious organization's activities will be "too" religious. Will the members of the group sing religious songs? Will they pray? Will they read the Bible? Will they proselytize? If they sing and pray, but do not read Scripture or proselytize, must the group be excluded? What if they just sing? What if they just pray? Does the answer change based on the significance of each activity in the group's religious traditions?

These are the kinds of distinctions this Court refused to countenance in *Widmar* and *Rosenberger*, and it appears the same concerns underlie *Lamb's Chapel*. Indeed, in *Widmar*, the Court characterized such distinctions as lacking "intelligible content" and beyond the competence of courts and school officials to administer. *Widmar*, 454 U.S. at 269-70 n.6; *Rosenberger*, 515 U.S. at 845 (quoting *Widmar*). More importantly, the Court stated that "[s]uch inquiries would tend inevitably to entangle the State with religion in a manner forbidden by our cases." *Widmar*, 454 U.S. at 270 n.6; *Rosenberger*, 515 U.S. at 845 (quoting *Widmar*).

The *amici* States submit that, as this Court stated in *Widmar*, the kinds of inquiry necessitated by the decision of the Second Circuit in this case will impermissibly entangle the State with religion and lead to official hostility toward private religious expression. This hostility is inconsistent with the Free Speech, Free Exercise, and Establishment Clauses of the First Amendment, and the Equal Protection Clause of the Fourteenth Amendment. The *amici* States thus urge the Court to grant the petition for writ of certiorari, reverse the judgment of the Court of Appeals, and remand for further proceedings.[3]

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[3] The *amici* States agree with Petitioners that summary disposition would be appropriate in this case. *See* Pet. for Cert. 21; *Mazurek* v. *Armstrong*, 520 U.S. 968, 976 (1997) (*per curiam*) (holding that summary disposition was appropriate where lower court's decision was clearly erroneous and had produced immediate consequences).

CONCLUSION

For the reasons stated above, the States of Alabama, Iowa, Louisiana, Mississippi, Nebraska, Ohio, South Carolina , Texas, and Virginia as *amici curiae*, respectfully ask the Court to grant the petition for writ of certiorari and reverse the judgment of the United States Court of Appeals for the Second Circuit in this case.

Respectfully submitted,

BILL PRYOR
Attorney General of Alabama
ALICE A. BYRNE
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[Seal]

State of Alabama
OFFICE OF THE ATTORNEY GENERAL

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July 29, 1999

MEMORANDUM

TO: All City and County Superintendents of Education

FROM: Bill Pryor, Attorney General
Michael R. White, General Counsel, State Department of Education

RE: Post *Chandler v. James* – Update Guidelines for Permissible Activities, Graduation Exercises and Baccalaureate Services

A joint memorandum to all superintendents regarding permissible religious activities in public school settings was sent to you on December 8, 1997. On April 13, 1998, you received Guidelines for Graduation Exercises and Baccalaureate Services. Since the decision by the United States Court of Appeals in *Chandler v. James*, we are writing this joint memorandum to update the guidelines based upon current decisions of the United States Supreme Court and the Eleventh Circuit Court of Appeals.

The Permanent Injunction issued by Judge DeMent against the DeKalb County school system in the *Chandler v. James* case has been vacated and remanded by the

Eleventh Circuit Court of Appeals. The Court found that "genuinely student-initiated religious speech" may not be suppressed nor restrictions applied "on the time, place, and manner of that speech which exceed those placed on students' secular speech."

These guidelines should enable you to ensure that students can fully exercise their First Amendment rights in an environment that does not conflict with the establishment clause.

GUIDELINES FOR RELIGIOUS ACTIVITIES IN SCHOOLS

Introduction

The following guidelines are issued to provide assistance to public school administrators and teachers. These guidelines are based on the rules reiterated by the Eleventh Circuit Court of Appeals in *Chandler v. James* and prior opinions of the United States Supreme Court. These guidelines are intended to be instructive and not all-inclusive.

Permissible Activities in General

- Students may voluntarily engage in individual or group prayer during non-instructional time or at school-sponsored events. This includes individual or group prayer before or after athletic events. School officials (e.g. coaches) should neither encourage nor discourage individual or group prayer. Organization or direction of a prayer by a school official would not be appropriate.

- Students may voluntarily engage in religious discussions during non-instructional time or at school-sponsored events. Students may speak to and attempt to persuade their peers about religious topics just as they do with regard to political or other topics.
- Students may express religious beliefs in reports, homework, art work, and other written and oral assignments, which should be judged by ordinary academic standards of substance and relevance.
- Private citizens (including students) may distribute religious literature in accordance with all applicable time, place and manner restrictions applicable to the distribution of literature that is unrelated to school curriculum activities.
- Students may display religious messages or symbols on items of clothing (e.g. cross, menorah, Star of David, etc.) to the extent that they may display comparable non-religious messages or symbols on items of clothing. Students also may wear particular attire (e.g. yarmulkes, head scarves, etc.) during the school day or school-sponsored events as part of the students' religious practices consistent with board policies and State law.
- Private citizens and student groups must be allowed access to school facilities for meetings of a religious nature, subject to the same limitations placed on non-religious meetings.
- Students in secondary schools may have announcements of meetings of a religious nature conveyed in the same manner that announcements are made for meetings of other non-religious groups (e.g. public address system, school newspaper, etc.).
- Teachers may teach about religion, including the Bible and other scripture, provided that such teaching concerns the history of religion, comparative religions,

the Bible (or other scripture) as literature, and/or the role of religion in the history of the United States. The use of religious symbols (e.g. cross, menorah, symbols of Native American religions) is permitted as a teaching aid or resource provided such symbols are displayed as an example of the cultural and religious subject being taught.

- A fixture or symbol that is traditionally associated with a particular religion (e.g. nativity scene, menorah, etc.) may be included as a "prop" in a school holiday production to the same degree that non-religious props are used in school productions, provided such symbols are displayed as an example of the cultural and religious heritage of the holiday.
- Traditional holiday music may be included in school productions (e.g. choral events, band activities, etc.) in keeping with the cultural or religious heritage of the holiday.

Special Considerations for Commencement/Graduation

Baccalaureate Services

- If a school by policy and practice rents out its facilities to private groups, it must rent them out on the same terms and conditions, and on a first-come first-served basis, to organizers of privately sponsored religious baccalaureate services.
- Teachers and school administrators must demonstrate and observe neutrality with regard to private baccalaureate services and school officials may neither encourage nor discourage student attendance at such events.
- Teachers and school administrators may attend such functions in their individual capacities.

- Baccalaureate services are to be announced or advertised in the same manner as other non-religious meetings, such as notices in the school newspaper or use of the public address system and bulletin boards.

Commencement Exercises

- Student initiated religious speech is permitted; however, school officials are not to encourage, organize, or direct such speech.
- Regularly scheduled student speakers (e.g., valedictorian, salutatorian class President) may make religious comments during their speeches. School officials are not to encourage or direct such speech.
- Valedictory and other student speakers may refer to Biblical passages.
- Student speakers may express thanksgiving to God during the course of their speeches.
- Religious persons and/or organizations are entitled to advertise in school commencement programs/directories on the same terms as other persons or community organizations.

The intent of these guidelines is to prescribe a course of study, conduct and related activities that do not prescribe directly or indirectly a single religion, belief or observance and that are consistent with the prevailing decisions by the United States Supreme Court and the Eleventh Circuit Court of Appeals.

Any questions regarding the above guidelines or conduct that is not specifically detailed above should be directed to the Office of the Attorney General, Bill Pryor, or the General Counsel for the Department of Education, Mike White.

UNITED STATES DEPARTMENT OF EDUCATION
THE SECRETARY

" . . . Schools do more than train children's minds. They also help to nurture their souls by reinforcing the values they learn at home and in their communities. I believe that one of the best ways we can help out schools to do this is by supporting students' rights to voluntarily practice their religious beliefs, including prayer in schools. . . . For more than 200 years, the First Amendment has protected our religious freedom and allowed many faiths to flourish in our homes, in our work place and in our schools. Clearly understood and sensibly applied, it works."

President Clinton
May 30, 1998

Dear American Educator,

Almost three years ago, President Clinton directed me, as U.S. Secretary of Education, in consultation with the Attorney General, to provide every public school district in America with a statement of principles addressing the extent to which religious expression and activity are permitted in our public schools. In accordance with the President's directive, I sent every school superintendent in the country guidelines on *Religious Expression in Public Schools* in August of 1995.

The purpose of promulgating these presidential guidelines was to end much of the confusion regarding religious expression in our nation's public schools that

had developed over more than thirty years since the U.S. Supreme Court decision in 1962 regarding state sponsored school prayer. I believe that these guidelines have helped school officials, teachers, students and parents find a new common ground on the important issue of religious freedom consistent with constitutional requirements.

In July of 1996, for example, the Saint Louis School Board adopted a district wide policy using these guidelines. While the school district had previously allowed certain religious activities, it had never spelled them out before, resulting in a lawsuit over the right of a student to pray before lunch in the cafeteria. The creation of a clearly defined policy using the guidelines allowed the school board and the family of the student to arrive at a mutually satisfactory settlement.

In a case decided last year in a United States District Court in Alabama, (*Chandler v. James*) involving student initiated prayer at school related events, the court instructed the DeKalb County School District to maintain for circulation in the library of each school a copy of the presidential guidelines.

The great advantage of the presidential guidelines, however, is that they allow school districts to avoid contentious disputes by developing a common understanding among students, teachers, parents and the broader community that the First Amendment does in fact provide ample room for religious expression by students while at the same time maintaining freedom from government sponsored religion.

The development and use of these presidential guidelines were not and are not isolated activities. Rather, these guidelines are part of an ongoing and growing effort by educators and America's religious community to find a new common ground. In April of 1995, for example, thirty-five religious groups issued "Religion in the Public Schools: A Joint Statement of Current Law" that the Department drew from in developing its own guidelines. Following the release of the presidential guidelines, the National PTA and the Freedom Forum jointly published in 1996 "A Parent's Guide to Religion in the Public Schools" which put the guidelines into an easily understandable question and answer format.

In the last two years, I have held three religious-education summits to inform faith communities and educators about the guidelines and to encourage continued dialogue and cooperation within constitutional limits. Many religious communities have contacted local schools and school systems to offer their assistance because of the clarity provided by the guidelines. The United Methodist Church has provided reading tutors to many schools, and Hadassah and the Women's League for Conservative Judaism have both been extremely active in providing local schools with support for summer reading programs.

The guidelines we are releasing today are the same as originally issued in 1995, except that changes have been made in the sections on religious excusals and student garb to reflect the Supreme Court decision in *Boerne v. Flores* declaring the Religious Freedom Restoration Act unconstitutional as applied to actions of state and local governments.

These guidelines continue to reflect two basic and equally important obligations imposed on public school officials by the First Amendment. First, schools may not forbid students acting on their own from expressing their personal religious views or beliefs solely because they are of a religious nature. Schools may not discriminate against private religious expression by students, but must instead give students the same right to engage in religious activity and discussion as they have to engage in other comparable activity. Generally, this means that students may pray in a nondisruptive manner during the school day when they are not engaged in school activities and instruction, subject to the same rules of order that apply to other student speech.

At the same time, schools may not endorse religious activity or doctrine, nor may they coerce participation in religious activity. Among other things, of course, school administrators and teachers may not organize or encourage prayer exercises in the classroom. Teachers, coaches and other school officials who act as advisors to student groups must remain mindful that they cannot engage in or lead the religious activities of students.

And the right of religious expression in school does not include the right to have a "captive audience" listen, or to compel other students to participate. School officials should not permit student religious speech to turn into religious harassment aimed at a student or a small group of students. Students do not have the right to make repeated invitations to other students to participate in religious activity in the face of a request to stop.

The statement of principles set forth below derives from the First Amendment. Implementation of these principles, of course, will depend on specific factual contexts and will require careful consideration in particular cases.

In issuing these revised guidelines I encourage every school district to make sure that principals, teachers, students and parents are familiar with their content. To that end I offer three suggestions:

First, school districts should use these guidelines to revise or develop their own district wide policy regarding religious expression. In developing such a policy, school officials can engage parents, teachers, the various faith communities and the broader community in a positive dialogue to define a common ground that gives all parties the assurance that when questions do arise regarding religious expression the community is well prepared to apply these guidelines to specific cases. The Davis County School District in Farmington, Utah, is an example of a school district that has taken the affirmative step of developing such a policy.

At a time of increasing religious diversity in our country such a proactive step can help school districts create a framework of civility that reaffirms and strengthens the community consensus regarding religious liberty. School districts that do not make the effort to develop their own policy may find themselves unprepared for the intensity of the debate that can engage a community when positions harden around a live controversy involving religious expression in public schools.

Second, I encourage principals and administrators to take the additional step of making sure that teachers, so often on the front line of any dispute regarding religious expression, are fully informed about the guidelines. The Gwinnett County School system in Georgia, for example, begins every school year with workshops for teachers that include the distribution of these presidential guidelines. Our nation's schools of education can also do their part by ensuring that prospective teachers are knowledgeable about religious expression in the classroom.

Third, I encourage schools to actively take steps to inform parents and students about religious expression in school using these guidelines. The Carter County School District in Elizabethton, Tennessee, included the subject of religious expression in a character education program that it developed in the fall of 1997. This effort included sending home to every parent a copy of the "Parent's Guide to Religion in the Public Schools."

Help is available for those school districts that seek to develop policies on religious expression. I have enclosed a list of associations and groups that can provide information to school districts and parents who seek to learn more about religious expression in our nation's public schools.

In addition, citizens can turn to the U.S. Department of Education web site (http://www.ed.gov) for information about the guidelines and other activities of the Department that support the growing effort of educators and religious communities to support the education of our nation's children.

Finally, I encourage teachers and principals to see the First Amendment as something more than a piece of dry, old parchment locked away in the national attic gathering dust. It is a vital living principle, a call to action, and a demand that each generation reaffirm its connection to the basic idea that is America – that we are a free people who protect our freedoms by respecting the freedom of others who differ from us.

Our history as a nation reflects the history of the Puritan, the Quaker, the Baptist, the Catholic, the Jew and many others fleeing persecution to find religious freedom in America. The United States remains the most successful experiment in religious freedom that the world has ever known because the First Amendment uniquely balances freedom of private religious belief and expression with freedom from state-imposed religious expression.

Public schools can neither foster religion nor preclude it. Our public schools must treat religion with fairness and respect and vigorously protect religious expression as well as the freedom of conscience of all other students. In so doing our public schools reaffirm the First Amendment and enrich the lives of their students.

I encourage you to share this information widely and in the most appropriate manner with your school community. Please accept my sincere thanks for your continuing work on behalf of all of America's children.

Sincerely,

s/ Richard W. Riley
Richard W. Riley
U.S. Secretary of Education

RELIGIOUS EXPRESSION IN PUBLIC SCHOOLS

Student prayer and religious discussion: The Establishment Clause of the First Amendment does not prohibit purely private religious speech by students. Students therefore have the same right to engage in individual or group prayer and religious discussion during the school day as they do to engage in other comparable activity. For example, students may read their Bibles or other scriptures, say grace before meals, and pray before tests to the same extent they may engage in comparable nondisruptive activities. Local school authorities possess substantial discretion to impose rules of order and other pedagogical restrictions on student activities, but they may not structure or administer such rules to discriminate against religious activity or speech.

Generally, students may pray in a nondisruptive manner when not engaged in school activities or instruction, and subject to the rules that normally pertain in the applicable setting. Specifically, students in informal settings, such as cafeterias and hallways, may pray and discuss their religious views with each other, subject to the same rules of order as apply to other student activities and speech. Students may also speak to, and attempt to persuade, their peers about religious topics just as they do with regard to political topics. School officials, however, should intercede to stop student speech that constitutes harassment aimed at a student or a group of students.

Students may also participate in before or after school events with religious content, such as "see you at

the flag pole" gatherings, on the same terms as they may participate in other noncurriculum activities on school premises. School officials may neither discourage nor encourage participation in such an event.

The right to engage in voluntary prayer or religious discussion free from discrimination does not include the right to have a captive audience listen, or to compel other students to participate. Teachers and school administrators should ensure that no student is in any way coerced to participate in religious activity.

Graduation prayer and baccalaureates: Under current Supreme Court decisions, school officials may not mandate or organize prayer at graduation, nor organize religious baccalaureate ceremonies. If a school generally opens its facilities to private groups, it must make its facilities available on the same terms to organizers of privately sponsored religious baccalaureate services. A school may not extend preferential treatment to baccalaureate ceremonies and may in some instances be obliged to disclaim official endorsement of such ceremonies.

Official neutrality regarding religious activity: Teachers and school administrators, when acting in those capacities, are representatives of the state and are prohibited by the establishment clause from soliciting or encouraging religious activity, and from participating in such activity with students. Teachers and administrators also are prohibited from discouraging activity because of its religious content, and from soliciting or encouraging antireligious activity.

Teaching about religion: Public schools may not provide religious instruction, but they may teach *about* religion, including the Bible or other scripture: the history of religion, comparative religion, the Bible (or other scripture)-as-literature, and the role of religion in the history of the United States and other countries all are permissible public school subjects. Similarly, it is permissible to consider religious influences on art, music, literature, and social studies. Although public schools may teach about religious holidays, including their religious aspects, and may celebrate the secular aspects of holidays, schools may not observe holidays as religious events or promote such observance by students.

Student assignments: Students may express their beliefs about religion in the form of homework, artwork, and other written and oral assignments free of discrimination based on the religious content of their submissions. Such home and classroom work should be judged by ordinary academic standards of substance and relevance, and against other legitimate pedagogical concerns identified by the school.

Religious literature: Students have a right to distribute religious literature to their schoolmates on the same terms as they are permitted to distribute other literature that is unrelated to school curriculum or activities. Schools may impose the same reasonable time, place, and manner or other constitutional restrictions on distribution of religious literature as they do on nonschool literature generally, but they may not single out religious literature for special regulation.

Religious excusals: Subject to applicable State laws, schools enjoy substantial discretion to excuse individual students from lessons that are objectionable to the student or the students' parents on religious or other conscientious grounds. However, students generally do not have a Federal right to be excused from lessons that may be inconsistent with their religious beliefs or practices. School officials may neither encourage nor discourage students from availing themselves of an excusal option.

Released time: Subject to applicable State laws, schools have the discretion to dismiss students to off-premises religious instruction, provided that schools do not encourage or discourage participation or penalize those who do not attend. Schools may not allow religious instruction by outsiders on school premises during the school day.

Teaching values: Though schools must be neutral with respect to religion, they may play an active role with respect to teaching civic values and virtue, and the moral code that holds us together as a community. The fact that some of these values are held also by religions does not make it unlawful to teach them in school.

Student garb: Schools enjoy substantial discretion in adopting policies relating to student dress and school uniforms. Students generally have no Federal right to be exempted from religiously-neutral and generally applicable school dress rules based on their religious beliefs or practices; however, schools may not single out religious attire in general, or attire of a particular religion, for prohibition or regulation. Students may display religious messages on items of clothing to the same extent that

they are permitted to display other comparable messages. Religious messages may not be singled out for suppression, but rather are subject to the same rules as generally apply to comparable messages.

THE EQUAL ACCESS ACT

The Equal Access Act is designed to ensure that, consistent with the First Amendment, student religious activities are accorded the same access to public school facilities as are student secular activities. Based on decisions of the Federal courts, as well as its interpretations of the Act, the Department of Justice has advised that the Act should be interpreted as providing, among other things, that:

General provisions: Student religious groups at public secondary schools have the same right of access to school facilities as is enjoyed by other comparable student groups. Under the Equal Access Act, a school receiving Federal funds that allows one or more student noncurriculum-related clubs to meet on its premises during noninstructional time may not refuse access to student religious groups.

Prayer services and worship exercises covered: A meeting, as defined and protected by the Equal Access Act, may include a prayer service, Bible reading, or other worship exercise.

Equal access to means of publicizing meetings: A school receiving Federal funds must allow student groups meeting under the Act to use the school media – including the public address system, the school newspaper, and the

school bulletin board – to announce their meetings on the same terms as other noncurriculum-related student groups are allowed to use the school media. Any policy concerning the use of school media must be applied to all noncurriculum-related student groups in a non-discriminatory matter [sic]. Schools, however, may inform students that certain groups are not school sponsored.

Lunch-time and recess covered: A school creates a limited open forum under the Equal Access Act, triggering equal access rights for religious groups, when it allows students to meet during their lunch periods or other noninstructional time during the school day, as well as when it allows students to meet before and after the school day.

Revised May 1998

List of organizations that can answer questions on religious expression in public schools

Religious Action Center of Reform Judaism
Name: Rabbi David Saperstein
Address: 2027 Massachusetts Ave., NW,
Washington, DC 20036
Phone: (202) 387-2800
Fax: (202) 667-9070
Web site: http://www.rj.org/rac/

American Association of School Administrators
Name: Andrew Rotherham
Address: 1801 N. Moore St., Arlington, VA 22209
Phone: (703) 528-0700
Fax: (703) 528-2146
Web site: http://www.aasa.org

American Jewish Congress
Name: Marc Stern
Address: 15 East 84th Street, New York, NY 10028
Phone: (212) 360-1545
Fax: (212) 861-7056

National PTA
Name: Maribeth Oakes
Address: 1090 Vermont Ave., NW, Suite 1200,
Washington, DC 20005
Phone: (202) 289-6790
Fax: (202) 289-6791
Web site: http://www.pta.org

Christian Legal Society
Name: Steven McFarland
Address: 4208 Evergreen Lane, #222,
Annandale, VA 22003
Phone: (703) 642-1070
Fax: (703) 642-1075
Web site: http://www.clsnet.com

National Association of Evangelicals
Name: Forest Montgomery
Address: 1023 15th Street, NW #500,
Washington, DC 20005
Phone: (202) 789-1011
Fax: (202) 842-0392
Web site: http://www.nae.net

National School Boards Association
Name: Laurie Westley
Address: 1680 Duke Street, Alexandria, VA 22314
Phone: (703) 838-6703
Fax: (703) 548-5613
Web site: http://www.nsba.org

Freedom Forum
Name: Charles Haynes
Address: 1101 Wilson Blvd, Arlington, VA 22209
Phone: (703) 528-0800
Fax: (703) 284-2879
Web site: http://www.freedomforum.org